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IN THE

Supreme Court of the United States

October Term, 1988

LAZAR LEVITIN, Individually and as General Partner of OCEAN PARKWAY MEDICAL BUILDING, A Limited Partnership,
Petitioner,

against

SEMYON POMIRCHY, HANS HOMBURGER as a Limited Partner and OCEAN PARKWAY MEDICAL BUILDING, A Limited Partnership,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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Petitioner,

v.

SEMYON POMIRCHY, HANS HOMBURGER as a Limited Partner and OCEAN PARKWAY MEDICAL BUILDING, a Limited Partnership,

Respondents.

- X

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT.

The sole business of Ocean Parkway Medical Building, the suject Limited Partnership, has been, and still is its rental as prime lessee to subtenants as

sub-lessees, several retail stores comprising a so-called "Medical Center," in a building located at 3049-51 Ocean Parkway, Brooklyn, New York, for use respectively by the sublessees as professional offices for the practice of Dentistry, Audiology, Hearing Aid Services, Ear, Nose & Throat Treatment and for a Retail Pharmacy.

Under the basic Limited Partnership Agreement dated May 1, 1980, the original capital of the Limited Partnership was fixed at $40,000, of which respondent Homburger paid $35,000 for his 21% interest as a Limited Partner and Levitin contributed $5,000 for his interest as a General Partner. Further, under the basic Limited Partnership Agreement of May 1, 1980, which named Levitin as General Partner, the respective distributable shares of the

Partnership of at least 80% of the distributable Partnership cash flow was derived from rents paid by the subtenants net of rent payable to the prime Landlord, as follows:

a. 79% to Levitin as a General Partner

b. 21% to Homburger as a Limited Partner.

The basic Limited Partnership Agreement further provided that Levitin as General Partner had the right to sell to respondent Pomirchy, as a Special Limited Partner, 39.5% of Levitin's 79% cash flow interest for a price of $40,000 paid to Levitin by Pomirchy. Thereafter, Levitin demanded of respondent Pomirchy an additional $25,100 which Pomirchy paid to Levitin on Levitin's representation to Pomirchy that said additional sum was needed to rescue the Partnership from

the "edge of financial collapse," so that the total cost to Pomirchy of his 39.5% of Levitin's 79% cash flow interest totalled $65,100.

As will be indicated hereinafter, eventually after joint trial of the action by respondent Homburger and respondent Pomirchy against Levitin, he was ousted as General Partner because of his wrongful misappropriation of Partnership funds in the amount of $314,500, and replaced as General Partner by respondent Homburger. Further, upon the law and the facts proved at the said joint trial, separate judgments against Levitin were awarded to respondent Homburger in the amount of $112,651 with interest and costs and to respondent Pomirchy, in the amount of $183,773.53, with interest and costs, for the wrongful failure by Levitin to

pay to said respondents their respective rights to Partnership cash flow, i.e. 21% payable to respondent Homburger, as a Limited Partner, and 39.5% of 79% payable to respondent Pomirchy, as a Special Limited Partner.

COUNTERSTATEMENT OF THE CASE.

Respondent Semyon Pomirchy opposes the instant petition for a writ of certiorari to review the decision and judgment awarded to this respondent against the petitioner after joint trial with the case of respondent Homburger without a jury before Hon. Gerald Held, Justice of the Supreme Court of the State of New York, County of Kings, affirmed on appeals taken by the petitioner to the Supreme Court of the State of New York, Appellate Division, Second Department, and sustained by the

State of New York Court of Appeals which denied petitioner's motion for leave to appeal to that Court.

As will be demonstrated herein, there is no basis on the law and on the facts of the case, either under the Constitution of the United States, the Rules of this Court, any Federal Statute, Rule of Law, or Decisional Precedent, for the relief now sought by the petitioner.

As will be further demonstrated herein, the instant petition is but one more device of the petitioner to escape the consequences of his own unlawful misconduct and egregious malfeasance in his operation of the business and financial affairs of the Limited Partnership while he was the General Partner thereof, justly resulting in his total ouster from the partnership, on absolute,

undisputed proof at the trial that petitioner Levitin had wrongfully converted to his own use partnership money totalling the sum of $314,500 in violation of the terms of the Partnership Agreement and of the rights thereunder of respondents Pomirchy and Homburger. None of the arguments used by the petitioner justify his petition for a writ of certiorari, all of which ignore the true facts of his wrongdoing, revealed upon trial and affirmed on all of his appeals. Moreover, it is notable that the petitioner's multiple appeals and now his instant petition, have been employed by him to evade to this day payment of the judgments awarded to respondent Pomirchy in the sum of $183,773.53, as well as to respondent Homburger in the sum of $112,651. Even levies on his personal financial resources attempted by

Sheriffs under executions on the Judgments served upon petitioner have been unavailing since the whereabouts of his financial resources could never be discovered and he has never even responded to the Sheriffs when the executions were served upon him.

The argument of petitioner Levitin in support of his petition demonstrates his unconscionable motives and strategy in his attempt to induce this Court to exercise its jurisdiction herein. Thus, he maligns the integrity of Mr. Strelzin, Counsel of Record for respondent Pomirchy, by insinuating "political overreaching" by Mr. Strelzin as a former member of the Legislature of the State of New York, to which he had been elected as an Assemblyman thereof, representing the County of Kings. On the basis of this insinuation, petitioner

had moved for a change of venue to Nassau County, claiming that the entire Kings County Judiciary was under the political influence of Mr. Strelzin. This motion was denied, and the case remained under the original jurisdiction of the Supreme Court, Kings County, and of the Appellate Division, Second Department thereof. Nor did the Court of Appeals, the last Court of Appellate Jurisdiction in the State of New York, accept any of these inuendoes by petitioner in denying Levitin leave to appeal to that Court.

Similarly, with regard to the Order of Justice Adler granting Levitin's request for trial by jury, Levitin does not state that the said Order of Justice Adler denied that portion of Levitin's motion which sought "to disqualify Mr. Strelzin from acting as

attorney for Pomirchy, reserving however, to the trial judge, the right to impose such restrictions upon Mr. Strelzin which may be justified during trial," and denied Levitin's motion in all other respects. Needless to say, no such inferences were found by Justice Held, as the Trial Judge, or by any of the Appeal Justices, and the joint trial before Justice Held was properly conducted without a jury since the relief sought in plaintiff Pomirchy's case was entirely equitable in nature. Thus, on Levitin's appeal from the judgment awarded to Pomirchy against Levitin after trial without a jury, the Justices of the Appellate Division, Second Department, of the Supreme Court of the State of New York, in their Order of November 28, 1988, rejected Levitin's claim that he was

denied his constitutional right to a jury trial, on the ground that the relief sought in Pomirchy's complaint being entirely equitable in nature, it is well established that where a plaintiff's complaint states an action in equity, it is triable without a jury, and the defendant as a matter of law is not entitled to a jury trial. Even where, as incidental to the main relief prayed for, the complaint asks for money damages, a separate trial by jury is not within the purview of the constitutional guarantee.

It is the same as to Levitin's contentions with regard to assignment of the trial to the "wrong judge" for joint trial with Homburger's case.

Notably on the same appeal, dated November 28, 1988, Levitin claimed that the case had been wrongly assigned to

Judge Held for joint trial with the case of respondent Homburger. The Appellate Justices rejected his claim as follows:

> "In any event, we note that at the inception of the Individual Assignment System, the parties simultaneously filed requests for judicial intervention, resulting in the random assignment of the instant case to two different justices. This material conflict appears to have been resolved by the Clerk's Office without external intervention. There is no evidence in the record of bias, prejudice or wrongdoing on the part of the Justice who heard the case, and whose retention of the action was recommended by the Administrative Justice of the Supreme Court, Kings County. There is therefore no impropriety or even appearance of impropriety in the Court's handling of this matter."

In this regard, it is notable that

Levitin himself had applied *pro se* to Justice Yoswein, the Chief Administrative Judge, for re-assignment of the case to Justice Vaccaro. Not only was Levitin's application denied by Justice Yoswein, but trial of the case was directed by Justice Yoswein to remain with Justice Held for joint trial with the Homburger case against Levitin, pursuant to a still outstanding Order dated October 29, 1984, never appealed from, made at Trial Term, Part I of the Supreme Court of the State of New York, County of Kings. That Order granted a motion brought on by Mr. Strelzin on behalf of Pomirchy for an Order directing joint trial of Pomirchy's case against Levitin, as Action #1 with Homburger's case against Levitin as Action #2 on the ground that all of the matters in issue in both cases involved

common questions of law and of fact. Homburger's counsel concurred in the motion, and Norman L. Rosenthal, Levitin's then counsel, appeared in opposition, but when, after due deliberation the motion was granted, the Order dated October 29, 1984 was entered "on the motion" of Mr. Rosenthal, directing that the Pomirchy case, as Action #1 be tried jointly with the Homburger case as Action #2, and that the joint trial of both cases be restored to the Trial Calendar accordingly.

CONCLUSION.

Upon the facts and the law of the case, there is no basis for review thereof by the Supreme Court of the United States, and the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ADDENDUM.

Resume of Pertinent Orders and Judgments

a. State of New York Court of Appeals, Order dated March 28, 1989, which denied Levitin's motion for leave to appeal to that Court in the Pomirchy case.

b. Supreme Court of the State of New York, Appellate Division, Second Department, dated November 28, 1988, which affirmed denial of Levitin's motion in the Court below to reassign the case to another judge, and affirmed the judgment dated December 11, 1987 awarded to Pomirchy against Levitin after a joint trial without a jury in the sum of $183,773.53, plus interest and costs.

c. Order of the Supreme Court of the State of New York, Trial Term Part I, dated October 29, 1984, never appealed from, directing joint trial of the case of Semyon Pomirchy v. Lazar Levitin, et al., with the case of Hans Homburger v. Lazar Levitin, resulting in a judgment dated November 20, 1987, entered December 1, 1987, awarded to Hans Homburger against Lazar Levitin after joint trial without a jury in the sum of $112,651 plus interest and costs.

d. Judgment awarded with interest, costs and disbursements after Joint Trial to Semyon Pomirchy v. Lazar Levitin in the sum of $183,773.53, and to Hans Homburger v. Lazar Levitin in the sum of $112,651, dated November 20, 1987, entered December 1, 1987.